

More to the point is NMPS's observation that the electric grid is not simple in concept or execution, but is the product of many interrelated power engineering factors. If one of those factors changes, other factors must be modified to ensure reliability. For these reasons UTC and EEI renew their request that the FCC not establish in advance a minimum or quantifiable threat to reliability before a utility may deny access under section 224(f)(2). Given the importance of reliable electric service, and the FCC's lack of prior experience with managing electric utility facilities, it would be contrary to the public interest for the Commission to attempt to establish its own determination of what constitutes a threat to reliability.

With regard to the Joint Cable Comments on access to ducts and conduits, UTC and EEI believe that ConEdison's comments are particularly illustrative of the real-world concerns that utilities have over providing access to these facilities. ConEdison states that utility personnel working on cables have been trained in this function, but employees of telecommunications and cable companies have no such formal training working with live electric cables -- this is both a safety and reliability concern. ConEdison notes that this concern is even greater in the context of conduits and ducts where, conceivably, the providers' employees would seek the right to work right next to live electric cables. "At least when working on a pole, there is a safety zone of 40 inches between electric cables and other cables, there is no such "safety zone" in a conduit or duct."⁴⁸

⁴⁸ Con Edison, p. 8.

ConEdison lists the following safety and reliability concerns which lead it to the conclusion that the ability of Con Edison to provide access to ducts and conduits consistent with the safe and reliable operation of its utility system is limited:

Providing and coordinating access in conduits and ducts is labor intensive. Utility employees would need to supervise all work and to provide support services, such as "flushing" the area out. Especially in congested areas where access or installation could be required on virtually a daily basis, the resulting manpower commitment and cost could be substantial. Specific concerns respecting work in ducts and conduits relate to maintenance and installation work and the potential need to take utility equipment out of service in order to accommodate such action. The problems and enormous cost and complexity of monitoring and accommodating duct and conduit work, particularly in the highly congested and reliability-critical central business district of New York City, makes the provision of such access, to a significant extent, impracticable. Even more important than the resulting cost and inefficiency, is the potential danger to the reliability of service. Access to ducts and conduits by another set of wires, installed by workers unfamiliar with the existing system and its unique characteristics, creates the danger of accidents and other occurrences (wear and tear due to usual subsurface conditions such as melting roadsalt) that could lead to service interruption.

UTC and EEI reiterate that the basis for the Commission's regulations, whatever they may be, must be that facility owners have an innate understanding of their system requirements and are presumed to be acting in good faith. For this reason, UTC and EEI oppose suggestions by NCTA and MFS that the utility should bear the burden of proof in denying access. However, if such a burden is imposed, EEI and UTC would endorse NMPS's suggestion that once a utility demonstrates through an engineering analysis that

proposed attachments quantifiably threaten reliability, that analysis should be considered a rebuttable presumption.⁴⁹

4. The FCC should not establish regulations regarding allocation of capacity.

A number of commenters agree with UTC and EEI in opposing the FCC's suggestion that it should establish regulations on the allocation of capacity. As Virginia Power notes, electric utilities rely on their local distribution facilities to meet present and anticipated power needs of their customers. It is therefore appropriate that the use of these facilities, including reasonable reserve capacity, be available for the electric customers on whose behalf they were installed, on an absolute priority basis over third-parties.⁵⁰ The idea of a facility owner not being able to reserve capacity for itself would be inconsistent with their public service obligation to ensure reliable electric service at least cost to consumers, would contravene state public service commission requirements, and would raise fundamental constitutional issues with regard to the taking of property.⁵¹

Moreover, as detailed in the Joint Comments of UTC and EEI, the 1996 Act does not provide the FCC with authority to prescribe how a utility allocates capacity. Rather, the Act proscribes unreasonable discrimination among attaching entities in the allocation of available capacity. The Commission must not attempt to pre-define reasonable or appropriate facility availability in all of the multitudinous circumstances which may (and

⁴⁹ NMPS, pp. 30-31. All associated costs of the engineering analysis should be absorbed the attaching entity.

⁵⁰ Virginia Power, p. 7.

⁵¹ See, *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 426 (1982).

certainly will) face facility owners as the telecommunications and electric utility markets evolve.

As a general matter, utilities should be allowed to consider a growth period when sizing facilities. A growth period of 10 years would seem to be adequate, but should not be adopted as an inflexible rule.⁵² Different standards may also be necessary for poles versus conduit. Because conduit has a much higher cost, and potential for community disruption, utilities should be able to size these facilities with far more discretion as to future use.

⁵² For example, the North American Electric Reliability Council (NERC), a non-profit organization founded by the electric industry in 1968 to help coordinate the reliability of electric systems, routinely analyzes projected utility loads and capacities for periods of up to 10 years at a time. Long-range planning such as this is critical in the capital-intensive, highly interdependent power grids operated by the electric power industry.

IV. Notification of Modifications — Section 224(h)

In implementing Section 224(h) the FCC seeks comment on whether it should establish requirements regarding the manner and timing of the notice that must be given under this provision to ensure that the recipient has a "reasonable opportunity" to add to or modify its attachment.

- A. Any requirements regarding the manner and timing of notice must recognize that the obligations of 224(h) only apply to instances where an inaccessible facility is being made accessible, and must themselves reflect reasonable facility-owner needs and ongoing business relationships**

Comments of attaching entities were all over the board as to what would constitute reasonable notice, ranging from 30 days, to 180 days, to an entire year. These longer time periods are clearly unacceptable, as they would unreasonably delay scheduled utility activities. As UTC and EEI indicated, a "reasonable opportunity" cannot mean notification under all circumstances. Moreover, neither can it mean providing attaching entities an opportunity to unnecessarily delay, complicate, or increase the cost of the reasonable and necessary modification activities of facility owners.

In addition, it must be stressed that any such notification will take place in the context of ongoing contractual and commercial relationships, with existing lines of and protocols for inter-corporate communication. Accordingly, UTC and EEI agree with the comments of Nynex and PacificTelesis that there is no need for detailed, prescriptive regulations. UTC and EEI renew their suggestion that if the FCC deems it necessary to

specify minimum notification requirements, notification via first-class mail would be reasonable under normal circumstances.

Several of the commenters appear to be confused over the scope and the meaning of Section 224(h).⁵³ Simply put, the notification requirement is only intended to apply to situations where the facility owner makes an otherwise inaccessible facility accessible. It is intended to give attaching entities an opportunity to take advantage of the fact the utility is making difficult-to-access facilities accessible for modification.⁵⁴ Accordingly, the requirement does not apply to situations where a facility is routinely accessible; e.g., a distribution pole along a residential street.

Further, the requirement should not apply in instances where notice is inconsistent with the need to maintain the provision of service to the public. Notification should not be required at all during routine maintenance, under circumstances where modification cannot be pre-scheduled, or where modification is otherwise necessary on an immediate basis. As UTC and EEI noted there are many common operational reasons which preclude specifying a stringent notification timetable or procedures, because a greater priority must be placed on public welfare, safety, and/or utility service restoration.

As indicated by UTC and EEI, the FCC's requirements must recognize that in the increasingly competitive utility industry it is becoming common place for electric utilities to offer service connections on an almost immediate basis. Notification requirements should not in any way be allowed to impede utility speed of service if it can be

⁵³ E.g., *see*, Joint Cable Comments, Time Warner and Winstar

⁵⁴ For example, when a utility opens up a trench the notification requirement of 224(h) would be triggered.

demonstrated that the utility is acting pursuant to commitments that it has made to customers or potential customers.

B. The "proportionate share" of costs to be borne by attaching entities, and how such a determination should be made, is entirely case specific

The FCC asked whether to establish rules to determine the "proportionate share" of the costs to be borne by each entity, and if so, how such a determination should be made. In responding, a number of commenters agree with UTC and EEI that the basic principle of cost recovery should be equality — each entity utilizing the opportunity to gain access should bear an equal portion of the full cost of providing access. As the Infrastructure Owners indicate, the proportionate share is a simple and understandable concept: to calculate the share, one takes the cost of accessing the pole, duct, conduit, or right-of-way space and divides that cost by the number of entities seeking to take advantage of the access.⁵⁵

The allocation of the proportionate cost of access under Section 224(h) relates solely to the cost associated with making the facilities accessible and is not in any way related to the cost of notification, or the cost of making modifications to an existing attachment. Therefore, the statement by the Joint Cable Commenters that if a party pays for a share of the capital costs under subsection 224(h), the on-going rental should be reduced to incremental costs is inaccurate.⁵⁶ Section 224(h) does not relate to capital

⁵⁵ Infrastructure Owners, p. 56.

⁵⁶ Joint Cable Comments, p. 20.

costs of the facilities: it relates only to the cost of making the facilities accessible (e.g., trenching or permitting costs.)

UTC and EEI renew their recommendation that facility owners should also be able to include the costs of notification itself as part of the proportionate costs of providing access. This cost should be paid regardless of whether the attaching entity decides to avail itself of the opportunity to modify its own facilities. This recognizes that notification does not particularly benefit the facility owner, but does specifically benefit attaching entities. Costs of notification should be directly billable, or included in the attachment rate as part of the administrative overhead of facility ownership, as dictated by individual circumstances such as established facility-owner practice or state law.

C. Payment of the cost of access by an attaching entity is completely irrelevant to any potential increase in revenues to the facility owner by reason of its own modifications.

UTC and EEI agree with those commenters who object to the FCC's suggestion that payment of access costs should be offset by the potential increase in revenues. The Infrastructure Owners correctly point out that the premise of the FCC's entire question is flawed -- 224 (h) is purely voluntary and does not force an attaching entity to request access.⁵⁷ Section 224(h) speaks in terms of sharing the cost of providing access, not the cost or revenue from modified facilities. Moreover, there is no practical way to ascertain how much of that cost theoretically is applicable to increased capacity for attachments.

⁵⁷ Infrastructure Owners, p. 57.

In addition, as Bell Atlantic notes, there should not be any offset for any additional revenues that the owner might someday receive for additional attachments which the modified facility might accommodate. Owners of poles and other facilities modify these facilities because they need to, not with an eye toward marketing space to additional attachées and whatever revenue they might produce.⁵⁸ This is particularly true in the case of electric utilities that are facing ever increasing scrutiny over resource allocations. In addition, as noted earlier by EEI and UTC, any such potential revenue stream is likely to be minimal when compared to the probable costs of the facility modification and administrative overhead of attempting to ascertain and allocate such a hypothetical revenue stream.

D. A facility owner's right to modify a facility or a prohibition against making unnecessary or unduly burdensome modifications or specifications, is beyond the scope of Section 224(h)

The FCC should not impose arbitrary limitations on an owner's right to modify a facility when necessary. As UTC and EEI indicated in their comments this issue is simply beyond the scope of this rulemaking. Section 224(h) addresses the sharing of costs of providing access for the modification of attaching equipment, including any applicable modification costs. It does not address the issue of assessing attaching entities for some allocable share of any benefits provided to them solely by the facility owner's modification of its own equipment.

⁵⁸ Bell Atlantic, p. 16

Moreover, UTC and EEI agree with GTE that it would be against the self interest of facility owners to make unnecessary or unduly burdensome modifications, at a time when they are facing increased competition. Winstar's allegation that LECs have strong incentives to generate new costs of doing business for their competitors has absolutely no relevance to electric utilities. As noted by UTC and EEI, electric utilities are at this very minute engaged in increased regulatory scrutiny, industry restructuring, and severe cost-cutting and downsizing. They are also faced with other pressures which would preclude engaging in unnecessary or overly costly facility modification. Moreover, the administrative overhead involved in attempting to bill for and recover facility modification costs could actually exceed the costs to be recovered.

V. Other Issues

A. States electing to preempt FCC pole attachment regulation may establish their own access requirements

Under Section 224(c) as amended, states are specifically permitted to preempt FCC jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits or rights-of-way, if they certify that they regulate in the interests of the subscribers of the various services. Accordingly, notwithstanding the Joint Cable Comments' assertion that the mandatory access provisions apply to utilities in states that preempt out from FCC authority,⁵⁹ the statute clearly gives the states authority to establish access requirements if they elect to assert jurisdiction. This position is supported by the comments of the D.C. Public Service Commission which states: "any definition the FCC provides in its regulations with respect to rates, terms and conditions

⁵⁹ Joint Cable Comments, pp. 20-21.

for access to poles, conduits and rights-of-way would not apply in states where such matters are regulated by state commissions. Section 224(c)(1) provides that the Commission has no jurisdiction in such cases.”⁶⁰

B. The FCC should caution against unauthorized attachments/modifications

The FCC needs to implement strict rules with regard to unauthorized attachments. The passage of the Telecommunications Act has increased the desire of attaching entities to get their facilities installed, and in several instances entities have attached to infrastructure or modified facilities without first obtaining the requisite permission or engineering studies. To the extent the FCC defines the rights, and obligations of pole owners and attaching entities in this proceeding, it should emphasize that attaching entities must initiate negotiations with pole owners and may not make attachments to or modifications of utility infrastructure absent an explicit agreement with the facility owner.

C. Costs of surveys and engineering studies are appropriately charged to attaching entities

UTC and EEI wish to respond to the GST’s recommendation that the FCC should limit the fees for engineering work and surveys to the incremental cost. GST’s recommendation amounts to an attempt to defray the cost of doing business as a telecommunications company by imposing the costs on the backs of electric industry customers and shareholders. These surveys and reports are necessary, as the number and type of attachments on a facility have a direct impact on the operation and reliability of

⁶⁰ D.C. Public Service Commission, p. 10.

the facility and the underlying services that the facility supports, moreover, they involve the use of utility capital, including physical plant and labor. The FCC has consistently permitted the recovery of legitimate non-recurring expenses throughout its administration of pole attachments. Nothing in the legislative history or the amended statute suggests that this should now be changed or that attaching entities should not be charged for the full amount of necessary engineering surveys and other non-recurring charges.

Overheads, including the costs and profits of those who provide services, are a legitimate part of any business.


VI. Conclusion

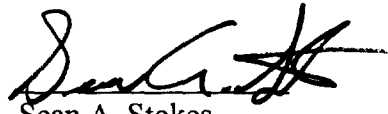
In adopting regulations to implement the right-of-way access provisions of Section 251(b)(4), the FCC should recognize that electric and gas utilities install and maintain poles, ducts, and conduit for the primary purpose of supplying the public with safe, reliable, and cost-effective energy services. Because of the myriad of operational and safety considerations relating to the provision of these services, the FCC should not attempt to define all of the conditions for access in advance, but should adopt flexible regulations for the speedy and equitable resolution of conflicts where parties are unable to reach a negotiated agreement. Nor should the FCC be influenced by the comments of cable television operators, competitive access providers and other telecommunications service providers who would impose on utilities and utility ratepayers many of their costs of constructing and operating competitive telecommunications networks.

WHEREFORE, THE PREMISES CONSIDERED, UTC and EEI request the Federal Communications Commission to take action in accordance with the views expressed in these reply comments.


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Attachment A

List of Acronyms for Commenting Parties

ACSI	American Communications Services, Inc.
ALTS	Association for Local Telecommunications
Ameritech	Ameritech
AT&T	AT&T Corp.
Bell Atlantic	Bell Atlantic
BellSouth	BellSouth
CBT	Cincinnati Bell Telephone
ConEdison	Consolidated Edison of New York
Cox	Cox Communications, Inc.
DCPSC	District of Columbia Public Service Commission
Delmarva	Delmarva Power and Light Co.
Duquesne	Duquesne Power and Light Company
FPC	Florida Power Corporation
FPSC	Florida Public Service Commission
GCI	General Communication, Inc.
GST	GST Telecom Inc.
GTE	GTE Service Corporation
GVNW	GVNW Inc./Management
Infrastructure Owners	American Electric Power Service Corporation, Baltimore Gas and Electric Company, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power & Light Company, Metropolitan Edison/Pennsylvania Electric Company, Montana Power Company, Northern States Power Company, Otter Tail Power Company, Pacific Gas & Electric Company, The Southern Company, Tampa Electric Company, Union Electric Company, Washington Water Power Company, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation
Joint Cable Comments	Continental Cablevision, Inc., Jones Intercable, Inc., Century Communications Corp., Charter Communications Group, Prime Cable, InterMedia Partners, TCA Cable TV, Inc., Greater Media, Inc., Cable TV Association of Georgia, Cable Television Association of Maryland, Delaware & the District of Columbia, Inc., Montana Cable TV Association, South Carolina Cable Television Association, and Texas Cable & Telecommunications Association
MCI	MCI Telecommunications Corporation
MFS	MFS Communications Company, Inc.
Michigan PSC	Michigan Public Service Commission
NCTA	National Cable Television Association, Inc.
Nextlink	NEXTLINK Communications, L.L.C.
NYNEX	NYNEX

Pacific Telesis	Pacific Telesis Group
NMPS	Public Service Company of New Mexico
SBC	SBC Communications Inc.
Sprint	Sprint Corporation
Teleport	Teleport Communications Group Inc.
TWC	Time Warner Communications Holdings, Inc.
TRA	Telecommunications Resellers Association
USTA	United States Telephone Association
U S West	U S WEST
Western Alliance	The Western Alliance
WinStar	WinStar Communications, Inc.